Petition

81-1107

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IN THE

SUPREME COURT OF THE UNITED STATES

NO._____

_____TERM, 198_

JAMES H. and DONNA M. HERZOG,

Petitioners,

vs.

ENDECO, INC.; LINCORP; CAVALIER ESTATES, INC.; ENVIRONMENTAL DEVELOPMENT CORP., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Donna M. Herzog pro se
James H. Herzog pro se
RR 3 - Box 78A
Pelican Rapids, Mn. 56572
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QUESTIONS PRESENTED

Whether the decision of the Eighth Circuit Court of Appeals erred in rendering its decision when the Court did not consider the evidence designed as a part of the record on appeal, which record conflicts greatly with the schedules attached to Respondent's Brief, at a time when the evidence was some 600 miles distant from the Eighth Circuit Court of Appeals; thus violating the Petitioners right to "due process".

Whether the decision of the Eighth Circuit Court of Appeals denied Petitioner, Donna M. Herzog, "due process" when the Court failed to give proper and adequate consideration to her contribution of personal funds to her homestead property, now subject to the constructive trust.

Whether the decision of the Eighth Circuit Court of Appeals erred in not taking Judicial Notice of a separate appeal (No. 81-1684) presently pending before the Eighth Circuit Court of Appeals, which has a direct and indispensable bearing upon the result of appeal (No. 81-1071) which is the subject of this Petition for Writ of Certiorari, but by not doing so has deprived the Petitioners of "due process".

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The Petitioners, James H. and Donna M. Herzog, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The slip opinion is found in the Appendix. The District Court filed a non-published opinion which is also found in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on October 20, 1981, and received by Petitioners on October 24, 1981. This Petition is filed within 30 days of the Court's judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The District Court's jurisdiction was invoked by the summons and complaint originally filed in the Sixth Division U.S. District Court for Minnesota on or about March 4, 1979.

Petitioners filed a Petition For Rehearing with the Court of Appeals on November 9, 1981. One day later, on November 10, 1981, the Court

of Appeals denied the Petition For Rehearing and did so without comment. The primary issue presented with the Petition For Rehearing was the fact that the evidence, designated as a part of the record on appeal, had been mailed by the Clerk of the Eighth Circuit Court of Appeals to the Clerk of the U.S. District Court for North Dakota at Fargo, North Dakota nearly two months prior to the Court of Appeals decision and was not available to the Appeals Court for its consideration.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five

Quoted in part: "No person shall be deprived of life, liberty, or property, without due process of law;"

Amendment Fourteen

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On or about March 4, 1979, an action was com-

menced against Petitioners by Respondent in the U.S. District Court for Minnesota, Sixth Division. This action was brought by Respondent for the purpose of obtaining a constructive trust on the homestead of Petitioners.

The trial was conducted in St. Paul, Minnesota on November 12, 1980 before Chief Judge Edward J. Devitt.

Judge Devitt rendered his opinion and order on January 9, 1981.

Petitioners filed their appeal on January 15, 1981. Subsequently the Eighth Circuit Court of Appeals assigned number 81-1071.

In a separate action on February 2, 1979, Respondent commenced case no. A3-79-13 in the United States District Court for North Dakota, Southeastern Division. This action seeks damages against Petitioner James H. Herzog and also seeks recovery of certain items litigated in other actions. Petitioner has asserted compulsory counterclaims seeking recovery of actual and compensatory damages of $610,765.83 and punitive damages of $1,775,000.00.

This North Dakota case was set for trial on

August 27, 1981, it was postponed at the request of Respondent as Respondent was not prepared for trial. This matter has been rescheduled for trial on December 17, 1981, before Chief Judge Paul Benson.

In a third and separate action, Petitioner James H. Herzog, filed applications on April 10, 1979, with the Bankruptcy Court of North Dakota, for compensation. The compensation applications were scheduled for Hearing on August 27, 1979. Petitioner James H. Herzog was noticed by telephone and given the wrong date thus Petitioner Herzog was not present at the Hearing. The Hearing resulted in a judgment being entered against him for the recovery of previously paid compensation and out-of-pocket expenses. Recently, it was discovered by Petitioners that the Bankruptcy Court Judgment includes items other than compensation and reimbursement for out-of-pocket expense.

This judgment for the return of compensation and out-of-pocket expense is presently under appeal to the Eighth Circuit Court of Appeals, file no. 81-1684.

In this appeal of the constructive trust, file no. 81-1071, Petitioners filed on November 9, 1981,

a Petition For Rehearing, which was supported by an Affidavit of James H. Herzog. This Affidavit relates the fact that on October 29, 1981, Affiant went to the U. S. Courthouse Building at Fargo, North Dakota, to review the files and records of case no. A3-79-13 now pending in the U. S. District Court for North Dakota, and previously referred to herein. While Affiant was going through the Clerk's files, Affiant discovered that the Clerk of Court at Fargo was holding a large box of exhibits. The box contained exhibits designated as part of the record on appeal on File No. 81-1071 (which is the subject of this Petition), and the box had been in the Clerk's possession since on or about August 24, 1981.

The next day, on November 10, 1981, the Eighth Circuit Court of Appeals denied the Petition For Rehearing and did so without comment.

Subsequent to trial in this (case no. 81-1071), the Respondent submitted seven schedules to the Trial Court purporting to represent facts developed from the evidence. These same schedules were attached to

Respondent's Brief to the Eighth Circuit Court of Appeals. Petitioners in their Reply Brief to the Eighth Circuit Court of Appeals took vigorous exception to the schedules as they grossly and intentionally misrepresent the evidence. It is these schedules that the District Court relied upon. Considering that the evidence, which was designated as a part of the record on appeal, was for over two months some 600 miles distant from the Appeals Court, it may be reasonable to conclude that the Appeals Court also relied upon these same schedules (analysis).

A simple and brief comparison, by the Eighth Circuit Court of Appeals, of the figures cited in the seven schedules (analysis by Respondent) to the actual evidence (records designated on appeal) would show conclusively that the figures cited in the seven schedules are grossly inaccurate and intentionally misrepresent the facts. How can a just decision be possible when it is dependent upon false and

misleading analysis? To compound matters, the Eighth Circuit chose to ignore the Petitioners Reply Brief which specifically sets out examples of the discrepancies in Respondent's analysis.

The Eighth Circuit cites in its decision "the evidence is overwhelming to support the district court's conclusion that monies were wrongfully diverted". Considering the fact that the evidence was some 600 hundred miles removed from the view of the Eighth Circuit Court of Appeals, it is difficult to understand the Court's comment.

The Eighth Circuit Court of Appeals goes on to state in its opinion "Herzog withdrew $710,660. from the estate to pay his fees". These are the same fees that are the subject of the appeal number 81-1684, which is presently pending before the Eighth Circuit Court of Appeals. Here a conclusion is drawn before the issue is decided on its merits.

In its decision, the Eighth Circuit Court of Appeals cites an argument by Counsel for Respondent which purports to show that Herzog's compensation is a wrongful diversion of money. The analogy itself is fictitious, it does not take into consideration several factors which were known to Respondent's Counsel. There is no showing on the record that compensation paid in 1977 totaling $226,500.00 represented compensation earned during 1977. Likewise, there is no showing on the record that all compensation for the years 1976 and prior were paid within the years in which compensation was earned. To make a comparison of the hourly billing rate, based upon the incomplete facts presented by Counsel for Respondent is a fraud upon the Court. For the Court of Appeals to cite an unsubstantiated statement by Counsel, as a major criteria of its decision, is clearly a violation of the Petitioners right to "due process". The fact of the matter is, a portion of the $226,500. paid in 1977 was for compensation earned in prior years but not paid until 1977; therefore the analogy is false.

The appeal (81-1684) involving denial of all compensation to Petitioner James H. Herzog has a direct and indispensable bearing upon the result of the constructive trust action (no. 81-1071), in that a portion of the funds that were used to construct the Crystal property was authorized compensation paid, later denied and now on appeal to the Eighth Circuit.

The District Court, with the concurrence of the Court of Appeals, erroneously concluded that the records (evidence) reflect that Petitioners only source of income, other than ENDECO was $35,000. during the period covered, when in fact, the record (evidence designed as a part of the appeal) reflects that the Petitioner's income during the period covered was in excess of $217,000. from sources other than ENDECO.

The District Court, in which the Eighth Circuit Court of Appeals concurred, erroneously concluded that the record (evidence) reflects that the homestead cost approximately $544,300. when in fact, the record (evidence) reflects the approximate cost to be $342,610.08.

The District Court, with the concurrence of the Court of Appeals, erroneously concluded that Mrs. Herzog "cannot suddenly become the benefactor of an allowance reaching $3,000. per month and a one-half million dollar homestead without questioning the source of the funds". The District Court, with the concurrence of the Eighth Circuit Court of Appeals, could just as easily reason correctly, that Mr. Herzog's income for many years prior to MIDECO, was very substantial; that Mrs. Herzog's monthly allowance had increased, not suddenly but steadily over a period of 20 years.

The District Court, with the concurrence of the Court of Appeals, erroneously concluded that personal funds of Mrs. Herzog were commingled with the monthly household allowance provided by her husband from all sources of income. The record (evidence) shows that Mrs. Herzog contributed personal funds derived from inherited monies and from borrowed funds. The statement erroneously attributed to the evidence was in fact made by Counsel for the Respondent, in a brief, even though Counsel for Respondent had information to the contrary which was developed during a pre-trial conference.

REASONS FOR GRANTING THE WRIT

1. PETITIONERS WERE DENIED DUE PROCESS OF LAW BECAUSE THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Petitioners, by reply brief to the Court of Appeals, took vigorous exception to schedules, attached to Respondent's brief to the Court of Appeals, and cited numerous instances where the schedules grosssly and intentionally misrepresent the evidence designated as a part of the record on appeal.

The evidence, so designated as a part of the record on appeal, was not available to the Court of Appeals, it was in the possession of the District Court for North Dakota, for use in another action. For two months prior to the Court of Appeals decision, the evidence, which proves the schedules to be false and misrepresent the facts, was stored, some 600 miles distant from the Court of Appeals and not available for its consideration.

When the Court of Appeals considered Petitioners' Petition For Rehearing, the evidence

designated as a part of the record on appeal, remained some 600 miles distant from view of the Court of Appeals.

The Petitioners have searched, without success, for decisions of other Courts that involve similar circumstances, where the vast majority of the records designated were physically separated and far removed from the Courts inspection and consideration. Because this issue is so unusual and basic to the rights guaranteed under the Constitution, it is necessary that the Supreme Court of the United States consent to issue its Writ of Certiorari.

2. PETITIONER, DONNA M. HERZOG, WAS DENIED DUE PROCESS OF LAW BECAUSE THE COURT OF APPEALS HAS SANCTIONED THE DISTRICT COURT'S DECISION THAT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERIVSION.

The District Court relied upon statements by Respondent's Counsel which are contrary to the record regarding her contributions to her homestead. The Court of Appeals affirmed this gross error and made other conclusions that are not supported by the record which has violated Mrs. Donna M. Herzog's due process of law.

The Trial Judge, during trial, was informed of a conflict of interest by Counsel for Mr. and Mrs. Herzog yet the Trial Judge did nothing to investigate or rectify it. In fact, the Trial Judge made no comment whatsoever regarding the conflict.

3. PETITIONERS WERE DENIED DUE PROCESS OF LAW BECAUSE THE COURT OF APPEALS HAS SANCTIONED THE DISTRICT COURT'S DECISION THAT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The District Court, premised its decision upon a Bankruptcy Court decision, which is on appeal. The Court of Appeals affirmed the District Court while at the same time considering the appeal of Bankruptcy Court's judgment. The Appeals Court has the cart before the horse. If the appeal from Bankruptcy Court Order is reversed, there can be no constructive trust on Petitioners homestead, which is the subject of the Petition for a Writ of Certiorari.

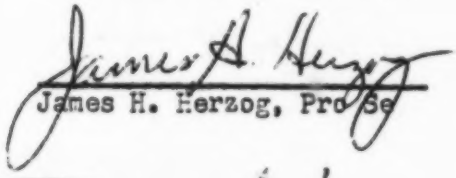
CONCLUSION

Based upon the foregoing, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

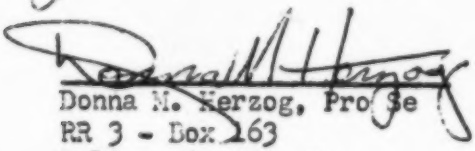
This case must be returned to the Court of Appeals Eighth Circuit with instructions that the

arguments along with the record designated on appeal be considered upon their merits.

Respectfully submitted,



James H. Herzog, Pro Se



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Dated November 20, 1981.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 81-1071

James McMerty, as Successor Trustee in the matter of Endeco, Inc., formerly a/k/a Environmental Development Corporation of North Dakota, a/k/a EDC, Inc., Lincorp Cavalier Estates, Inc., Environmental Development Corp., Inc., and E.D.C., Inc., Debtors,	*	
Appellees,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota
James H. Herzog and Donna M. Herzog,	*	
Appellants.	*	
Clinton E. Foslien; Irma Foslien: Paul R. Frazee, Mildred H. Frazee; Harold Engebretson d/b/a Engebretson Plumbing and Heating.	*	

Submitted: October 14, 1981
Filed: October 21, 1981

Before BRIGHT, Circuit Judge, GIBSON, Senior Circuit Judge, and ROSS, Circuit Judge.

PER CURIAM.

This appeal arises from a district court[1] order imposing a constructive trust on property purchased by James and Donna Herzog. The district court found that the property was acquired and improved with funds which James Herzog acquired in breach of his fiduciary duty as a trustee in bankruptcy. We affirm the district court order.

James Herzog was trustee for the ENDECO bankruptcies[2] from 1973 through 1978. Herzog bought property located on Lake Crystal in Minnesota in 1976. He constructed a home on it, with the contractor being a corporation he formed, Jason Enterprises, Inc. The stipulated value of the land and house is $450,000.

An action was brought by the successor trustee, James McMerty, alleging that the lake

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[1]The Honorable Edward J. Devitt, Chief Judge (now Senior Judge), United States District Court for the District of Minnesota.

[2]ENDECO is the name of a conglomeration of five corporations; Cavalier Estates, Inc.; Environmental Corp. of North Dakota; and E.D.C., Inc.

Crystal property was acquired and improved with monies wrongfully diverted from the ENDECO bankruptcy estate. The District court found that the allegations were substantiated, and imposed a constructive trust on the property.

The evidence is overwhelming to support the district court conclusion that monies were wrongfully diverted. The diversions came from several sources. Herzog withdrew $710,660 from the estate to pay his fees, $602,150 of it without court authorization. For instance, in 1977 alone he took $226,500 in compensation. To have earned that amount at his $35 per hour fee, he would have had to work 17.7 hours per day for 365 days. Furthermore, Herzog established two corporations, Jason Enterprises and Niagara Secretarial Services, for the purpose of diverting funds from ENDECO to Herzog. This district court's conclusion as to Herzog's wrongdoing is amply supported by the record.

We also agree with the district court that Donna Herzog's interest in the property does not preclude its being subjected to a constructive trust. First,

the fact that wrongfully diverted funds were comingled with other funds does not preclude imposition of a constructive trust. Second, Donna Herzog failed to show that she contributed her personal funds to the property. Third, if she did contribute funds, they were funds which her husband wrongfully acquired as a bankruptcy trustee and then gave to her. Under the circumstances, any such funds can be traced to the Lake Crystal home.

The only question of law facing this court is whether Minnesota's Homestead Exemptions law, Minn. Stat. § 510.01, prevents imposition of a constructive trust on the Lake Crystal property. The statute provides: "The house owned and occupied by a debtor as his dwelling place, together with the land upon which it is situated . . . shall constitute the homestead of such debtor and his family, and be exempt from seizure or sale under legal process on account of any debt . . . . " Herzog argues that the Lake Crystal property is his homestead and thus exempt from seizure.

Herzog misunderstands the nature of a constructive

trust. The trust res is the wrongfully diverted funds. The plaintiff is entitled to follow his property into its product. Dobbs, Remedies § 4.3, at 242 (1973). In this case, the wrongfully diverted funds can be traced to Lake Crystal. Because Lake Crystal is the product of the diverted property, the homestead exemption does not apply. American Ry. Express Co. v. Houle, 169 Minn. 209, 210 N.W. 889 (1926); Dobbs, Remedies § 4.3, at 247-48 (1973).

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNPUBLISHED DECISION OF THE
DISTRICT COURT

MEMORANDUM AND ORDER
Civ. 6-79-156

This is a suit by a successor trustee of an estate against the former trustee seeking the imposition of a constructive trust upon the former trustee's homestead. The homestead is a substantial home built on Lake Crystal. This case was tried to the Court in a two day trial on November 12 and 13. Plaintiff, the successor trustee for ENDECO, INC., alleged and sought to prove that the prior trustee, through various schemes, took money, property and services from the estate of ENDECO, INC. and used that money, property and services to purchase land for and build the former trustee's homestead. Defendant argues that plaintiff failed to establish that monies wrongfully taken were used to build the homestead, and that in any event the homestead statute precludes the imposition of a constructive trust. Defendant also argues that some of the homestead was purchased or improved with his wife's personal funds and to the extent that it was it should be exempt from the constructive trust.

The court finds for plaintiff.

A constructive trust is not created by the court rather it is a creature of equity which arises because of and contemporaneously with the wrongful diversion or wrongful retention of funds. Shearer v. Barnes, 272 Minn. 156, 136 N.W. 861, 864 (1912). The constructive trust is a remedy designed to prevent the unjust enrichment of the person who wrongfully diverts or retains funds. Knox v. Knox, 222 Minn. 477, 25 N.W. 2d 225, 228-29 (1946). The person who wrongfully diverts or retains the funds becomes the trustee ex maleficio

who then holds the money or property in trust for the beneficiary, the person equitably entitled to it. American Ry. Express Co. v. Houle, 169 Minn. 209 210 N.W. 889 (1976); Henderson v. Murray, 108 Minn. 76, 79, 121 N.W. 214, 219 (1909). Once a constructive trust arises, the court must decide whether or not to enforce it by directing the trustee ex maleficio to return the property to the equitable owner. Shearer v. Barnes, 272 Minn. 156, 136 N.W. 2d 861, 864 (1912).

The constructive trust includes the funds or property which were wrongfully diverted or retained as well as the proceeds thereof, American Ry. Express Co. v. Houle, 169 Minn. 209, 210 N.W. 889 (1976), and such trust is not cut off until the money or property reaches the hands of a bona fide purchaser for value. Id.at 890.

The burden of establishing the entitlement to a constructive trust rests on the beneficiary, the person seeking the imposition of the trust and that burden must be met by "clear and satisfactory evidence." Thompson v. Nesheim, 280 Minn. 407, 159 N.W. 2d 910 (1968). However, if plaintiff elects the remedy of a constructive trust and meets its burden, plaintiff has an absolute right to that remedy and a denial of that remedy under such circumstances would constitute reversible error. Cisewski v. Cisewski, 129 Minn. 284, 152 N.W. 642 (1915).

ENDECO was in the business of constructing modular housing units, its primary tenants were employees of the missile sites in northeastern North Dakota. ENDECO and its subsidiaries were placed into a Chapter X proceeding in the fall of 1973. Defendant Herzog was the trustee of ENDECO from September 1973 until December 1978; the trustee's primary task was to sell large numbers of modular units which had been vacated. In December 1978 defendant Herzog was indicted for embezzling funds from the estate of ENDECO, Inc. He thereafter pled guilty or nolo contendere to five counts of the indictment. On August 28, 1979, in a civil suit relating to defendant Herzog's trusteeship, the Honorable Jacob Dim issued an order denying Defendant Herzog's request for trustee's fees and expenses in the amount of approximately $482,000 and further entered judgment against defendant Herzog in the

amount of $718,126 for compensation and expenses already paid on grounds that Mr. Herzog had breached his fiduciary duty by embezzling funds. In re ENDECO, INC., 1 Bkcy Rptr 64 (D.N.D. 1979).

The undisputed evidence shows that defendant Herzog established Jason Enterprises, Inc. and Niagara Secretarial Services; that those two corporations performed services for ENDECO, INC. for which ENDECO paid significant sums of money; and that Jason Enterprises, Inc. was the general contractor for the construction of defendant's home at Lake Crystal, the property here at issue. Defendant further admitted that the homestead consisted, in part, of a modular unit taken from ENDECO and that he did not pay for that unit.

Plaintiff has further established by "clear and satisfactory evidence," Thompson v. Nesheim, 286 Minn. 407, 159 N.W. 2d 910 (1968) that defendant diverted cash, property or services in the amount of approximately $544,300.00, that the corporations Jason Enterprises and Niagara Secretarial were created primarily as a means to divert that cash, property or services from ENDECO to defendant Herzog under the auspices of a legitimate business purpose and that the monies and services so obtained were used to purchase land for and to build defendant's home at Lake Crystal.

Jason Enterprises received from ENDECO approximately $310,423.00 in net profit for services performed. Mr. Herzog testified that the services rendered were on site supervision to assure delivery of and to make repairs on the modular units. The job costs on the individual projects ranged from nothing to approximately $1800 whereas the income ranged from $10,000 to $59,000; thus the profits exceeded 5000% in some cases. Defendant's exhibit 6. Furthermore, the total receipts for Jason Enterprises was approximately $788,000; of that total only approximately $12,000 was for work performed for entities not related to ENDECO. Defendant's exhibit 6. That Mr. Herzog transferred money from ENDECO or one of its subsidiaries to himself or one of his companies for purposes of covering his own debts is further evidenced by the St. Marie-Gunkleman transaction. See, Plaintiff's Exhibit No. 23. 1/

1/ In that transaction Jason Enterprises is-

Jason Enterprises also received approximately $180,000 from Mr. Herzog between May 1976 and August 1978; of that amount approximately $78,000 was returned to defendant. The evidence indicates that the money Mr. Herzog transferred to Jason Enterprises was money he received from ENDECO, most of which was received as trustee's fees. Plaintiff's Exhibit 53. Between May 1976 and August 1978 Mr. Herzog transferred to Jason Enterprises approximately $180,000. Defendant's Exhibit No. 6; of that $180,000 total, 6 transfers totaling $39,500 have a corresponding transfer in exact amount and date from ENDECO to Mr. Herzog; 9 of the transfers totaling $62,000 have a transfer from ENDECO to Mr. Herzog which corresponds in time and are approximately the same amount. The remaining transfers from Mr. Herzog to Jason Enterprises have transfers corresponding approximately in time and amount from ENDECO to Mr. Herzog. Id., Plaintiff's Exhibit No. 53.

The records do not indicate and defendant did not testify as to the purpose of the transfers by Mr. Herzog to Jason Enterprises. However, it is apparent that those transfers were for purposes of covering expenses incurred by Jason Enterprises in building defendant Herzog's Lake Crystal home. Jason Enterprises expended approximately $421,000 on the Lake Crystal site for property and job costs. Defendant's exhibit 6. In addition ENDECO paid approximately

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1/footnote continues
sued a check in the amount of $15,031.11 to St. Marie-Gunkleman, apparently for furniture. The check was issued on December 12, 1977. The check was returned for lack of sufficient funds on December 15, 1977, and then presented a second time. On December 15, Sad Horse Mercantile Co., a subsiairy of ENDECO, issued a check to ENDECO in the amount of $15,000. That same day ENDECO issued a check in the same amount to Jason Enterprises. The original $15,000 check from Jason Enterprises to St. Marie-Gunkleman then cleared the bank.

$65,650 in wages and related expenses for work done on the Lake Crystal site. Id. and also "contributed" a modular unit for defendant's home. There was disputed evidence on the value of the modular unit. Defendant testified that it was worth approximately $3000, plaintiff valued it at approximately $7,000. Defendant's own records indicate that it was worth approximately $7,000. Plaintiff's exhibit No. 18. ENDECO was not reimbursed for either the labor costs incurred or the modular unit. 2/

Defendant attempted to show that the homestead was purchased and constructed with monies he earned from sources other than ENDECO. However, the record reflects that the homestead cost approximately $544,300. The only source of income other than ENDECO which defendant testified to was a $10,000 short term loan and $35,000 received as trustee's fees in the Gunkleman bankruptcy. Both parties agreed that the $10,000 loan was repaid in 1979 and thus must have been paid by funds Mr. Herzog acquired from ENDECO. Defendant Herzog did not introduce any evidence showing that the fees he received from Gunkleman were invested into the house.

Where there is a comingling of funds which rightfully belong to the trustee ex maleficio with those wrongfully diverted or retained, the burden rests on the wrongdoer to prove which funds are rightfully his. Thompson v. Nesheim, 280 Minn. 407, 159 N.W. 2d 910 (1968); Petersen v. Swan, 239 Minn. 98, 57 N.W. 2d 842 (1953), and in assessing the evidence all reasonable doubts

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2/ Defendant argued that ENDECO owed Jason Enterprises for unreimbursed labor costs on some other jobs and that the labor at the Lake Crystal job was in payment for that account receivable. Defendant was unable to state the amount ENDECO allegedly owed Jason Enterprises. Furthermore, in light of the unreasonable profits received by Jason from ENDECO jobs, it is difficult to believe that ENDECO owed Jason Enterprises anything.

should be resolved against the wrongdoer. Somers v. Kane, 168 Minn. 420, 210 N.W. 287 (1926). If defendant is unable to meet that burden and if an equitable division is impossible, the entire trust property belongs to the one who did no wrong. Thompson, 159 N.W. 2d at 916; Petersen, 57 N.W. 2d at Accord Maryland Casualty Co. v. Shroeder, 446 S.W. 2d 117, 121 (Tex. Civ. App. 1969). Defendant has failed to meet that burden here.

Defendant also attempted to show that his wife contributed some monies to the homestead and that plaintiff is therefore not entitled to the remedy of a constructive trust. Defendant's argument lacks merit. The mere fact that the wrongfully diverted or wrongfully retained funds are comingled with other funds does not preclude the imposition of a constructive trust. American Ry. Express Co. v. Houle, 169 Minn. 209, 210 N.W. 889 (1926); Shearer v. Barnes, 118 Minn. 179, 136 N.W. 861 (1912). Plaintiff's remedy is not thereby limited to a lien against the property. Shearer, 136 N.W. at 864.

Moreover, defendant has failed to show that his wife contributed personal funds to the homestead. Mrs. Herzog testified that she inherited $15,000 from her father which she received sometime in 1973. However, according to her testimony that money was invested in certificates of deposit which remained in the bank until March 16, 1979. Mrs. Herzog further testified that when the money was withdrawn it was used to meet necessary living expenses. That money could not therefore have been used to build or improve the homestead. On cross examination Mrs. Herzog admitted that she received an allowance from Mr. Herzog and that allowance was as high as $3,000 per month. It is obvious, in this case where defendant Herzog received virtually all his income directly or indirectly from ENDECO that the allowance given his wife was money he either embezzled or wrongfully obtained from ENDECO. Defendant did not introduce specific evidence that any of his wife's allowance was used to improve the homestead, and thus failed to meet his burden to show a contribution of legitimate funds to the trust. Moreover, any con-

tribution attributable to the wife's allowance could not be held free from the constructive trust. It is well established that the beneficiary may follow the property into the hands of a wrongdoer or a transferee provided the transferee is not a bona fide purchaser. Costell v. First Nat'l Bank, 274 Ala. 606, 150 So. 2d 683 (1963) (Constructive trust imposed notwithstanding fact that wrongdoer transferred money to her uncle who then bought real estate). See generally, American Ry. Express Co. v. Houle, 169 Minn. 209, 210 N.W. 889 (1976). Mrs. Herzog was not a bona fide purchaser. There is no evidence that she gave any consideration for the monthly "allowance." Nor can Mrs. Herzog, in this case, be deemed entirely unknowledgable of the true state of affairs. Though she testified that her husband did not discuss business affairs with her, reason dictates that a person cannot suddenly become the benefactor of an allowance reaching $3,000 per month and a one-half million dollar homestead without questioning the source of the funds.

For reasons set forth herein, the court finds for plaintiff and imposes a constructive trust on the Lake Crystal property. Defendant is directed to convey that property to plaintiff.

Dated: January 9, 1981.

S/ Edward J. Devitt
EDWARD J. DEVITT, Chief Judge
United States District Court

Opposition

Office - Supreme Court, U.S.
FILED
JAN 12 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1107

JAMES H. AND DONNA M. HERZOG,

Petitioners,

v.

ENDECO, INC.; LINCORP, INC.;
CAVALIER ESTATES, INC.;
ENVIRONMENTAL DEVELOPMENT
CORP., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1107

JAMES H. AND DONNA M. HERZOG,

Petitioners,

v.

ENDECO, INC.; LINCORP, INC.;

CAVALIER ESTATES, INC.;

ENVIRONMENTAL DEVELOPMENT

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The respondents, Endeco, Inc., Lincorp, Inc., Cavalier Estates, Inc., and Environmental Development Corp., Inc., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion, as yet unpublished, was included in the appendix to the petition.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners' claim of due process violations is frivolous and no reasons exist for issuance of a writ of certiorari.

This case was tried by the United States District Court pursuant to the Federal Rules of Civil Procedure. Petitioners appeared at that trial and were represented by counsel there. They testified and submitted evidence for the Court's consideration, and judgment was entered in favor of respondent. Petitioners' appeal was heard by the Eighth Circuit Court of Appeals in accordance with the Federal Rules of Appellate Procedure. Petitioners briefed the appeal and filed a rebuttal brief with the Circuit Court. The decision of the District Court was affirmed. Petitioners had their day in Court, they were heard, and

they received the Court's judgment. They exercised their right of appeal and received the decision of the Circuit Court. No due process rights of petitioners were denied.

This is a fact-specific case in which the trial court found that respondent carried his burden of proving that moneys wrongfully diverted by petitioner, James H. Herzog, from the debtor estates he served as trustee were used to purchase and improve certain real property in the State of Minnesota. The Court recognized the existence of a constructive trust in respondent's favor and ordered that possession, use and title to the property be given to respondent. Petitioners assert that the proof was somehow inadequate and that the Court failed to give "proper and adequate consideration" to their evidence. Petitioners seek a writ of certiorari on the contention that the evidence submitted at trial does not support the decision of the District and Appellate Courts. Writs of certiorari do not issue to review evidence or to discuss specific facts. **U.S. v. Johnston**, 268 U.S. 220, 227. Thus, that assertion by petitioners is insufficient to support the issuance of a writ.

Petitioners raise no special or important federal

questions that would have any impact on any other than the parties to this action. This case turns on its own facts which are not only peculiar to this case, but are not likely to recur. Indeed, the questions raised by petitioners are trivial at best in relation to the kinds of questions appropriate for writ of certiorari review.

No conflicts between circuits is cited; indeed, no real question of law is raised. No important federal question is before the Court here; nor are any conflicts between the lower court decision and prior decisions of the Supreme Court. Rather, petitioners raise a nebulous claim of violation of their due process rights, when in actuality the problem is that they disagree with the lower court's view of the evidence. Petitioners have no due process right to have their case retried by the Supreme Court. **Magnum Co. v. Coty**, 262 U.S. 159, 163. That is apparently what they seek in their petition for a writ of certiorari and the writ should be denied.

Respectfully submitted,

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